Supreme Court, U.S.
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No. 91-923

In The

Supreme Court of the United States

October Term, 1991

GEARY DISTRIBUTING COMPANY, INC.,

Petitioner,

v.

ALL BRAND IMPORTERS, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the powers granted the states under the Twenty-First Amendment to the United States Constitution can be abrogated by a state constitutional provision.

II. Whether an appellate court has jurisdiction to determine an issue briefed by a party, but not raised by that party in its Notice of Appeal and Statement of Issue Presented on Appeal.*

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* Question II is misleading because it assumes facts directly contravened by the record. This Court should not accept the Petitioner's assertion that the issue in question was briefed at the appellate level without having been raised timely and properly.

NOTICE CONCERNING PARTIES TO THIS PROCEEDING

Pursuant to Rule 29.1 of the Supreme Court Rules, the Respondent notifies the Court that while this case was pending before the U.S. Court of Appeals for the Eleventh Circuit, All Brand Importers, Inc. was acquired from Heublein, Inc. by Guinness Import Company.

CORPORATE PARENT: Currently, All Brand Importers, Inc. is a wholly-owned subsidiary of Guinness Import Company, a Delaware corporation.

CORPORATE SUBSIDIARIES: Currently, All Brand Importers, Inc. owns one hundred percent (100%) of the issued stock of Mega Merchandising, Inc., a Delaware corporation, and forty-nine percent (49%) of the issued stock of All Brand Importers of Texas, Inc., a Texas corporation.

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ALL BRAND IMPORTERS, INC.,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, All Brand Importers, Inc. respectfully prays that the Court deny Geary Distributing Company, Inc.'s petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

CITATIONS TO JUDGMENTS AND OPINIONS DELIVERED BELOW

The District Court's order of March 20, 1989, ruling that Florida's beer distribution law applied over Florida's statute of frauds to determine the merits of the case, is attached to the Petitioner's certiorari petition as Appendix 2.

The District Court's initial final judgment, dated June 21, 1989, is attached to the Petitioner's certiorari petition as Appendix 3.

The Eleventh Circuit's decision of May 22, 1991, reversing the District Court's ruling and vacating its initial final judgment has been published by West Publishing Company at 931 F.2d 1431 (11th Cir. 1991).

The District Court, complying with the Eleventh Circuit's order and mandate, convened a new trial of this case on November 11, 1991. The District Court filed a new final judgment and accompanying memorandum on December 11, 1991; copies of that judgment and memorandum are attached to this response as composite Appendix "1."

STATEMENT OF THE CASE

At all times pertinent to this action, All Brand Importers, Inc. ("All Brand") was a New York corporation authorized to do business in Florida as a supplier of alcoholic beverages. (R2-52-2) (App.-2).[1] At all times pertinent to this action, Geary Distributing Company, Inc. ("Geary") was a Florida corporation that distributed alcoholic beverages at the wholesale level between suppliers and retailers. (R2-52-2) (App.-2).

THE PARTIES' ORAL CONTRACT

From 1978 through 1987, Geary was authorized by All Brand to commercially distribute certain imported beers (e.g., *Moose Head Beer*) in certain Florida geographical markets (e.g., Orange County, Volusia County and Brevard County). (R2-52-2) (App.-2). Geary and All Brand conducted business pursuant to an oral agreement, and never executed a binding, written contract. (App.-2,3). On or around March 15, 1984, a written agreement memorializing the terms of the parties' oral contract (the "Memorial") was prepared and executed by All Brand, and

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[1] Citations made to the record on appeal to the Eleventh Circuit will be identified as ("R___-___-___"), reflecting the volume number, docket number and page number of each reference. Citations to transcripts of the 1989 trial will be identified as ("R___-___") and will include the volume number assigned by the Eleventh Circuit, as well as the page number. Citations to the District Court's findings following its post-appeal retrial of the case will be identified as ("App-___") and will reference Appendix 1 of this response, which contains copies of the District Court's final judgment and accompanying memorandum dated December 11, 1991.

submitted to Geary for execution. (App.-2). Geary, however, refused to sign the Memorial due to a dispute over a provision concerning the distributorship's exclusivity. (R2-53-10, *et seq.*) (App.-2). Aside from the issue of exclusivity, the parties acknowledge that the Memorial accurately reflected the terms of the oral contract that defined their business relationship. (R2-47-13) (App.-2).

Two provisions of the parties' business relationship are especially pertinent to this case. Section 16 of the Memorial reflects that the distribution rights granted by All Brand to Geary were personal to the distributor, and could not be assigned or transferred by Geary to any third party without All Brand's prior written consent. (App.-6). Also, Section 11(A)(5) of the Memorial shows that All Brand had the contractual right to terminate Geary "forthwith" if the distributor sold or transferred substantially all of its physical assets, ownership or control. (App.-6,7).

In February of 1985, Geary's business had declined to the point that All Brand would not ship any product to the distributor without prepayment or a letter of credit. (App.-3). By 1987, Geary was operating at a point of marginal profitability at best. (R2-52-2) (App.-3).

FLORIDA'S NEW BEER LAW

In the Summer of 1987, the Florida Legislature adopted a new beer distribution law. Codified as Section 563.022 of the Florida Statutes, the beer law gave distributors significantly expanded powers and new rights in their dealings with beer suppliers. For example, Subsection 7 of the new law guaranteed to beer distributors

certain powers allowing them to sell or assign their distributorship rights to third parties. Similarly, Subsection 18 of the new law created new causes of action for distributors, and granted them previously non-existent entitlements to attorneys' fees and punitive damages.

Section 563.022 took effect in June of 1987. Subsection 15 of the new law expressly provided that the statute applied to all beer distribution business relationships – even those already established by pre-existing contracts.

THE SALE OF GEARY'S BUSINESS

In September of 1987, Geary's owner and chief executive officer, William Geary, announced to All Brand that he had agreed to sell his business *in toto* to Grantham Distributing Company ("Grantham"). (R2-52-2) (App.-3). Contract documents drafted and executed by Geary and Grantham, without All Brand's knowledge or participation, set the purchase price and terms of the sale. (R5-58,59) (App.-3). According to the proposed Geary-Grantham transaction, William Geary would be paid an additional $75,000.00 if he could insure that Grantham would be designated as All Brand's authorized distributor for the Brevard County market. (R2-49-3) (App.-3).

By letter dated September 11, 1987, William Geary asked All Brand to evaluate and accept Grantham as the supplier's authorized distributor for the Brevard County market. (R5-62) (App.-3,4). Pursuant to William Geary's request, All Brand reviewed Geary's proposed successor in accordance with the supplier's established evaluation criteria and procedures. (R2-52-3) (R5-91) (App.-4). Based on its review, All Brand determined that Grantham

was not suitably qualified to serve as the supplier's authorized distributor in Brevard County for a variety of business reasons. (R2-52-3); (R5-91); (App.-4). By the end of October, 1987, Geary was informed of All Brand's rejection of Grantham. (App.-4).

Prior thereto, however, on September 25, 1987, Geary published a Notice of Bulk Transfer in a Brevard County newspaper, advising that the distributor was transferring substantially all of its assets to Grantham. (App.-5). Moreover, on October 12, 1987, Geary consummated the sale of substantially all of the company's assets and distribution rights to Grantham. (App.-5).

Upon being notified of All Brand's refusal to designate Grantham as its authorized distributor, Geary instituted this action against the supplier. (R2-52-3); (App.-5). Geary sued All Brand for breach of contract and asserted that the recently-adopted beer distribution law, Section 563.022 of the Florida Statutes, obligated All Brand to accept Geary's choice of Grantham to serve as All Brand's authorized distributor for the Brevard County market. (R3-62-2,3).

COURSE OF PROCEEDINGS

Geary filed its complaint in the Orange County Circuit Court on October 27, 1987. (R1-1-5, *et seq.*). All Brand petitioned to remove this action to the U.S. District Court for the Middle District of Florida, Orlando Division, on October 31, 1987, based on diversity jurisdiction. (R1-1-1). Removal of the case was acknowledge by the District Court on November 2, 1987. (R1-3-1).

Beginning on January 27, 1988, the parties launched a series of competing motions for summary judgment. (R2-25-1); (R2-29-1); (R2-47-1); (R2-49-1); (R3-65-1). All

Brand argued for summary judgment based on Florida's statute of frauds, Section 725.01 of the Florida Statutes; Geary sought summary judgment based on the newly-adopted beer distribution law, Section 563.022 of the Florida Statutes. (R2-47-3).

The District Court granted partial summary judgment to Geary in its order of March 20, 1989, wherein U.S. District Judge Patricia Fawcett ruled that Section 563.022 superceded Section 725.01 and applied to this action. (R3-62-7). The District Court's March 20th order went on to find that several material issues of fact remained, requiring the case to proceed to trial. (R3-62-16).

Subsequently, a non-jury trial was held on June 19, 1989, before U.S. District Judge Robert Merhige, Jr., sitting by designation. (R3-82-1). Judge Merhige began the trial by acknowledging that the law of the case would comport with the March 20, 1989 Order issued by Judge Fawcett concerning the applicability of Section 563.022 over Section 725.01. (R5-21).

On June 21, 1989, a final judgment was entered by Judge Merhige in favor of Geary and against All Brand. (R3-85-1). Applying Section 563.022, the final judgment awarded Geary $75,000.00 in compensatory damages, no punitive damages, pre-judgment interest in the amount of $14,351.22 and attorney's fees in the amount of $25,000.00, for a total sum of $114,351.22. (R3-85-1).

All Brand filed a timely Notice of Appeal on July 21, 1989. (R3-86-1). Geary filed its notice of Cross-Appeal on August 2, 1989. (R3-87-1).

On February 8, 1990, Geary moved to dismiss All Brand's appeal on jurisdictional grounds. Geary's motion

asserted that All Brand's Notice of Appeal and Statement of the Issue Presented on Appeal failed to preserve the constitutional issue addressed in the supplier's appellate brief. After reviewing legal memoranda on the jurisdictional issue, the Eleventh Circuit denied Geary's dismissal motion by order dated July 23, 1990.

By decision filed on May 22, 1991, the U.S. Court of Appeals for the Eleventh Circuit reversed the District Court's determination that Section 563.022 governed the parties' distribution agreement. The appellate court ruled that retroactive application of Section 563.022 violated the Contracts Clause of the Florida Constitution (Fla. Const. art. I, § 10) by unduly impairing All Brand's rights under the parties' preexisting distribution agreement. Because it ruled on state law grounds, the Eleventh Circuit did not address whether retroactive application of the new beer statute violated the Contracts Clause of the Federal Constitution (U.S. Const. art. I, § 10, cl. 1). The Eleventh Circuit's decision vacated the District Court's final judgment and remanded the case for further proceedings consistent with the appellate court's ruling.

Geary initially petitioned this Court for a writ of certiorari through its filing dated October 24, 1991. Due to procedural infirmities, the Clerk of this Court refused to file Geary's initial submission, and returned it for correction. Geary refiled a corrected certiorari petition, which counsel for All Brand received via U.S. Mail on December 9, 1991.[2]

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[2] Counsel for the Petitioner has failed to properly notify the Respondent of the date on which it filed its corrected

(Continued on following page)

Because Geary declined to request a stay of the Eleventh Circuit's mandate during this Court's consideration of the pending petition, the District Court convened a new trial of this case on November 11, 1991. On December 11, 1991, U.S. District Judge Robert Merhige filed a memorandum and entered a final judgment adjudicating all claims in favor of All Brand.

SUMMARY OF ARGUMENTS

Geary's certiorari petition raises one substantive argument involving the Twenty-First Amendment to the U.S. Constitution, and one jurisdictional argument based upon Rules 3(a) and 10(b)(3) of the Federal Rules of Appellate Procedure. Both arguments lack merit.

I. The Twenty-First Amendment

Geary's substantive argument confuses the purpose and function of the Twenty-First Amendment. As this Court has noted on several occasions, the Twenty-First Amendment is a check on the *federal* government's authority to impede state control of the alcoholic beverage industry.

(Continued from previous page)

petition, as required by Rule 12.1. Instead, counsel for the Respondent received an authorized notice form on December 30, 1991 reflecting a filing date of October 24, 1991 – the date when Geary unsuccessfully attempted to file its first, unacceptable petition.

The petition before this Court, however, does not involve federal restraint of state alcohol laws.

The Eleventh Circuit reversed the District Court because retroactive application of the Florida beer law at issue in this case impaired All Brand's pre-existing contract rights in violation of the Contracts Clause of the *Florida* Constitution. Geary's petition might have raised a colorable argument had the Eleventh Circuit based its ruling on the Contracts Clause of the Federal Constitution. The Eleventh Circuit avoided that situation, however, by deciding the case on the narrower state law grounds.

Nor do any of the considerations identified in Rule 10 of the Supreme Court Rules justify Geary's petition. The Eleventh Circuit correctly recognized that Florida rigidly enforces the prohibition against impairment of contracts set forth in its own constitution. The Eleventh Circuit's ruling comports with Florida precedents establishing that the types of contracts at issue in this case (*i.e.* contracts involving the distribution of alcoholic beverages) cannot be impaired by the Florida Legislature in disregard of the Florida Constitution's Contracts Clause. *See, e.g. Park Benziger and Co. v. Southern Wine & Spirits, Inc.*, 391 So. 2d 681, 683 (Fla. 1980); *Gans v. Miller Brewing Co.*, 560 So. 2d 281, 283 (Fla. 4th DCA 1990). There is no substantive basis for disturbing the Eleventh Circuit's decision in this case.

II. Notice of Appeal

As for Geary's jurisdictional argument, it is rebutted by the record. Geary presents its question in such a way as to assume that the issues briefed during the appellate

proceedings in this case were not properly raised before the Eleventh Circuit. Geary's argument lacks merit because its fundamental assumption is false.

There was no violation of Rules 3 or 4 of the Federal Rules of Appellate Procedure because All Brand's Notice of Appeal was timely filed. Moreover, both All Brand's Notice of Appeal, dated July 21, 1989, and its Statement of Issue Presented on Appeal, dated August 3, 1989, properly preserved the District Court's ruling on the applicability of Florida's beer distribution law as the subject of appeal.

In fact, Geary's jurisdictional argument was already raised previously, and rejected. Following the filing of All Brand's initial brief, Geary sought the dismissal of All Brand's appeal by the Eleventh Circuit arguing that the initial brief raised a new constitutional issue not preserved properly by earlier filings. The appellate court reviewed legal memoranda from the parties on the very issue that is now before this Court, and denied Geary's dismissal motion. A copy of the Eleventh Circuit's ruling on this jurisdictional issue was attached to Geary's certiorari petition as Appendix 7.

Neither of the questions presented by Geary justify disturbing the Eleventh Circuit's action in this case. Nor are there any Rule 10 considerations justifying Geary's petition; the Eleventh Circuit's opinion applies state law, not federal law, and is completely consistent with Florida precedents.

Accordingly, Geary's petition for certiorari should be DENIED.

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit correctly held that the Contracts Clause of the Florida Constitution prohibited retroactive application of Florida's beer distribution statute to the parties' pre-existing agreement

Throughout the parties' litigation, Geary has attempted to focus attention on the Contracts Clause of the U.S. Constitution, rather than the Florida Constitution. By focusing on federal law, Geary hoped to argue that any impairment of All Brand's preexisting contract rights by Florida's beer distribution law was permissible because the Twenty-First Amendment to the U.S. Constitution gives Florida broad powers to regulate the alcoholic beverage industry. Geary's argument is misguided because the Twenty-First Amendment is irrelevant to this case.

The Twenty-First Amendment to the U.S. Constitution was designed to end the "noble experiment" by which the federal government tried to control the drinking habits of all citizens. Section 1 of the Twenty-First Amendment repealed the Eighteenth Amendment and effectively conceded that the goal of Prohibition could not be attained at the federal level. Section 2 of the Twenty-First Amendment gave the states broad authority to deal with the subject of intoxicating liquor free from many of the limitations imposed by the Commerce Clause, which had hampered state liquor regulation prior to adoption of the Eighteenth Amendment.

Because it involves a grant of authority from the federal government to the states, the Twenty-First Amendment is relevant only when a state alcoholic beverage law is challenged as a violation of federal law. The

cases cited in Geary's petition, for example, pit the state's authority to regulate alcoholic beverages under the Twenty-First Amendment against the individual's rights to attend "nude dance bars" under the First Amendment to the U.S. Constitution. *E.g., City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92, 93 L. Ed. 2d 334 (1986); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 69 L. Ed. 2d 357 (1981); *Fillingim v. Boone*, 835 F.2d 1389 (11th Cir. 1988).

In this case, however, All Brand argued, and the Eleventh Circuit agreed, that retroactive application of Section 563.022 violated the Contracts Clause of the Florida Constitution. Where a state statute is challenged as a violation of the state's *own constitution*, the Twenty-First Amendment has no relevance whatsoever. *See Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 917-18 n.4 (1st Cir. 1988) (rights protected by state constitution need not address preferred position afforded to alcoholic beverage laws by Twenty-First Amendment). As one state supreme court has aptly summarized: "The [United States] Supreme Court has *never* espoused the proposition that the Twenty-First Amendment of the Federal Constitution confers a power on the States which is superior to or free from the constraints of their *own constitutions*." *Bellanca v. New York State Liquor Authority*, 54 N.Y. 2d 228, 236, 429 N.E. 2d 765, 769, 445 N.Y.S. 2d 87, 91 (1981), *cert. denied*, 456 U.S. 1006, 73 L. Ed. 2d 1300 (1982) (emphasis added); *accord Heublein, Inc. v. Department of Alcoholic Beverage Control*, 376 S.E. 2d 77, 78-79 (Va. 1989) (Twenty-First Amendment is not relevant when statute is challenged under a state constitution's prohibition against contract impairment); *see also California v. LaRue*, 409 U.S.

109, 115, 34 L. Ed. 2d 342, 350 (1972) (power of the Twenty-First Amendment is exercised in the context of "other provisions of the United States Constitution").

In this case, the retroactive application of Section 563.022 was not challenged on First Amendment grounds. The Eleventh Circuit's decision in this case was founded expressly upon the beer law's contravention of the Contracts Clause contained in Florida's Constitution. *Geary Distributing Company, Inc. v. All Brand Importers, Inc.*, 931 F.2d 1431, 1434 (11th Cir. 1991). In footnote 4 of the Eleventh Circuit's decision, the appellate court recognized that "Florida courts interpreting the Florida Contract Clause appear to tolerate less impairment than the federal courts interpreting the Federal Contract Clause." *Id.* at n.4, *citing Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774, 780 (Fla. 1979).

The Eleventh Circuit's decision is supported by Florida case law. In case after case, the Florida Supreme Court has made it clear that "virtually no degree of contract impairment has been tolerated in this State." *Yamaha Parts Distributors, Inc. v. Ehrman*, 316 So.2d 557, 559 (Fla. 1975); *accord e.g., Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So.2d 681, 683 (Fla. 1980). Thus, "[a]ny legislative action which diminishes the value of a contract is repugnant to and inhibited by the constitution." *In re: Advisory Opinion*, 509 So.2d 292, 314 (Fla. 1987); *see State Department of Transportation v. Edward M. Chadbourne, Inc.*, 382 So.2d 293, 297 (Fla. 1980) (any statute "which attempt[s] to affect existing contracts flies into the wall of absolute prohibition"); *Lee County Bank v. Christian Mutual Foundation, Inc.*, 403 So.2d 446, 448-49 (Fla. 2d

DCA 1981) ("in practice" the Florida Supreme Court has "prohibited any form of contract impairment").[3]

Florida's rigid enforcement of its constitutional prohibition against the impairment of contracts dictates the outcome of this case. Although the Twenty-First Amendment returns to each state the power to regulate alcoholic beverages within that state's boundaries, the amendment does not allow state authorities to violate their own state constitutions. *See, e.g., Mickens v. City of Kodiak*, 640 P.2d 818, 821 (Alaska 1982); *Commonwealth v. Sees*, 373 N.E. 2d 1151, 1155 (Mass. 1978); *Sekne v. City of Portland*, 726 P.2d 959, 963-64 (Or. App. 1986); *cf. Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81, 64 L. Ed. 2d 741, 752 (1980) (states may adopt a constitutional provision that provides more protection than its federal equivalent). Geary has cited no authority to rebut this point.

Had the Eleventh Circuit based its decision on the Federal Contracts Clause, Geary *might* have had a colorable basis to support its petition. The Eleventh Circuit, however, based its decision upon the rigidly-enforced Contracts Clause of the Florida Constitution. In this context, Geary has no basis upon which to invoke the powers of the Twenty-First Amendment.

Accordingly, for the reasons set forth above, this Court should deny Geary's petition for a writ of certiorari.

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[3] *See also, Dewberry v. Auto-Owners Insurance Company*, 363 So.2d 1077, 1080 (Fla. 1978) ("[i]t is axiomatic that subsequent legislation which diminishes the value of a contract is repugnant to our Constitution"); *Hardware Mutual Casualty Co. v. Carlton*, 9 So.2d 359 (Fla. 1942) ("[t]he obligation of a contract is impaired when the substantive rights of the parties thereunder are changed").

II. All Brand's appeal was properly brought before the Eleventh Circuit

All Brand properly appealed the District Court's final judgment, which applied Section 563.022 of the Florida Statutes to adjudicate the merits of this action. Pursuant to Rule 3(a) of the Federal Rules of Appellate Procedure, All Brand filed its Notice of Appeal in a timely fashion. Geary has failed to identify any flaw in All Brand's Notice of Appeal.

Similarly, in accordance with Rule 10(b)(3), All Brand filed its Statement of the Issue Presented on Appeal. In its petition, Geary's argument quoted only a portion of All Brand's Statement of the Issue Presented on Appeal. *See* Geary's Petition at 4-5. What Geary's argument failed to acknowledge is that the remainder of All Brand's statement expressly referenced the District Court's ruling that Section 563.022 could be applied retroactively to govern the adjudication of this action. *See* Geary's Petition at Appendix 4.

All Brand's appeal comported with the Federal Rules of Appellate Procedure, as well as the rules of the Eleventh Circuit. No reasonable review of the appellate materials filed by All Brand can sustain Geary's claim that All Brand waived the appellate court's jurisdiction over the issue set forth in All Brand's initial/answer brief of January 8, 1990. *See Foman v. Davis*, 371 U.S. 178, 181-82, 9 L. Ed. 2d 222, 225-26 (1962) (liberal construction afforded to appellate rules); *Matute v. Procoast Navigation, Ltd.*, 928 F.2d 627, 629-30 (3d Cir. 1991) (liberal construction afforded to notices of appeal); *C. A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir. 1981)

cert. denied 454 U.S. 1125, 71 L. Ed. 2d 112 (1981) (where claims or issues are intertwined, each claim may be reviewed on appeal even though all are not referred to in the notice of appeal). In this case, the District Court's constitutional analysis of Section 563.022 was intertwined with its decision to apply that law over Florida's statute of frauds.

Moreover, this Court should note that Geary raised this same argument with the Eleventh Circuit, when it filed a motion to dismiss with an alternative motion for extension of time. Both parties submitted briefs on the very jurisdictional issue now raised by Geary. The Eleventh Circuit denied Geary's motion to dismiss, but granted Geary additional time to respond with its answer/reply brief. It is evident from the record before this Court that Geary was not prejudiced in any way by All Brand's formulation of the issues on appeal. *See C. A. May Marine Supply Co., supra* at 1056 (likelihood of prejudice assessed in determining validity of appeal).

Finally, the plain language of Rule 3(a) clearly states that:

> Failure of an appellant to take any step *other than the timely filing of a notice of appeal* does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. (Emphasis added.)

All Brand's Notice of Appeal was timely filed, so jurisdiction is not the issue here. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316, 101 L. Ed. 2d 285, 291 (1988), *citing Foman v. Davis, supra* (confirming the "liberal construction" rule governing appellate procedure matters). What

Geary's petition really challenges is the Eleventh Circuit's exercise of its discretion. The Eleventh Circuit evaluated Geary's jurisdictional argument, and denied it. Geary has offered nothing to show an abuse of the appellate court's Rule 3 discretion.

Accordingly, for the reasons set forth above, Geary's Petition for Writ of Certiorari should be DENIED.

CONCLUSION

Geary has neither the substantive nor jurisdictional grounds upon which to receive a writ of certiorari from this Court. Nor has the Petitioner cited a Rule 10 basis to justify disturbing the Eleventh Circuit's decision.

Accordingly, Geary's petition for certiorari should be DENIED.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

GEARY DISTRIBUTING COMPANY, INC.

V.

ALL BRAND IMPORTERS, INC.

JUDGMENT IN A CIVIL CASE

(Filed Dec. 12, 1991)

CASE NUMBER: 87-969-CIV-ORL-19

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff recover nothing of the defendant and that judgment is entered in favor of the defendant All Brand Importers, Inc., who stands dismissed with its costs.

December 11, 1991
Date

/s/ David L. Edwards
Clerk

M'FILM ROLL #76
DOCUMENT #1126

/s/ Cindy J. Burgess
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

GEARY DISTRIBUTING COMPANY, INC., Plaintiff,	)	Case No. 87-969-ORL-CIV-19
v.	)	
ALL BRAND IMPORTERS, INC., Defendant.	)	

MEMORANDUM

(Filed Dec. 11, 1991)

After having heard the evidence, the Court makes the following findings of fact and conclusions of law.

The Plaintiff, Geary Distributing Company, Inc. (Geary), is a Florida-based distributor, and the Defendant, All Brand Importers, Inc. (All Brand), is a New York corporation doing business in the State of Florida. The amount involved exceeds the sum of $50,000 exclusive of interest and costs, and jurisdiction is attained by virtue of diversity of citizenship. 28 U.S.C. § 1332.

The Court finds from the evidence that the Plaintiff entered into an agreement with All Brand in 1978 whereby Geary was granted the right by All Brand to distribute beer imported by All Brand in Orange, Volusia, and Brevard Counties, all in the State of Florida. Their agreement was an oral one until about March 15, 1984, when a written agreement evidencing the terms of the then existing oral contract was executed by All Brand. Geary refused to execute the agreement because of its

disagreement with one of its terms. Nevertheless, the business relationship continued by virtue of an oral understanding until 1987, when the instant dispute arose.

In 1985, Geary ceased its operations in Orange County and assigned its distribution rights for that market to Jim Taylor Corporation. Prior to doing so, Geary sought and received the consent of All Brand. At the time, All Brand approved Jim Taylor to become a nonexclusive, authorized distributor for its products in Orange County, Florida. Subsequent thereto, Geary sought to assign its distributorship rights for Volusia County to Central Florida Distributors and, as it had with the Jim Taylor assignment, sought and received All Brand's consent.

It should be noted that sometime in 1985, Geary's business had declined to the point that All Brand would not ship any product to it without prepayment or a letter of credit. These requirements were met.

Sometime in 1987, Geary was operating at a point of marginal profitability and, indeed, between March and October of that year, Geary had made no effort to purchase any products from All Brand. In September of 1987, Geary negotiated the sale of its assets and operations to Grantham Distributing Company, Inc. (Grantham) without the knowledge or participation of All Brand. The agreement between Grantham and Geary called for payment of an additional $75,000 upon Grantham being designated All Brand's distributor for Brevard County. At the conclusion of the negotiation of the terms of Geary's sale to Grantham, William Geary, President of Geary, by letter of September 11, 1987, advised All Brand of the

Grantham transaction and requested its cooperation. This communication was followed by a number of telephonic efforts in which Geary sought prompt approval of Grantham as its authorized successor. The evidence reflects that Mr. Geary was informed that All Brand would have to review the situation according to its established evaluation procedures before it would designate Grantham as a new distributor. The record also reflects that one gentlemen of All Brand was instructed by his superior to evaluate Grantham as a proposed distributor for the Brevard County market and to expedite the process wherever possible.

A review pursuant to All Brand's established evaluation criteria procedures was made, including conversations with Geary and the principal of Grantham. At no time was either Geary or Grantham given written approval of their proposed transaction. Indeed, All Brand concluded that Grantham was not the best choice to serve as its distributor for the Brevard market in part because Grantham lacked a distribution warehouse facility in Brevard County, and Grantham's perceived limited involvement in beer distribution. The evidence reflects that Grantham's primary distribution dealt with wine and other alcoholic beverages excluding beer, which represented twenty-five percent of Grantham's distribution.

In short, All Brand concluded Grantham was not suitably qualified according to its criteria, and by the end of October, 1987, Geary was informed of All Brand's rejection of Grantham as an authorized distributor of its product lines for the Brevard County market.

Prior thereto, however, on September 25, 1987, Geary published a Notice of Bulk Transfer in the Brevard County newspaper, advising that Geary was transferring substantially all of its assets to Grantham. And, on October 12, 1987, Geary sold substantially all of the assets and distribution rights belonging to the company to Grantham. Upon being notified by All Brand of its refusal to consent to the assignment to Grantham, Geary brought this suit seeking both monetary and injunctive relief.

At about the time of its filing of suit, Geary, for the first time since March of 1987, sent All Brand a purchase order for a total of 1,430 cases of beer. This order was referenced in a letter to All Brand from William Geary dated October 29, 1987. His order, however, contra to credit policies in effect with All Brand, did not include cash or check payments, and his purchase order was returned unfilled. This was followed by a letter from All Brand to Geary stating that it was not filling his request because (1) he was no longer in business having apparently sold out to Grantham; (2) that his purchase order had provided All Brand with insufficient lead time to fill the order; (3) that he had not placed any other orders with All Brand since March 17, 1987; and (4) the purchase order lacked an irrevocable standby letter of credit or certified check.

It is to be noted that the letter, dated November 4, did not specifically terminate Geary as a distributor to All Brand and, indeed, concluded with the phrase "We await your response." No response was forthcoming except a communication from counsel alleging a breach on the part of All Brand. Efforts were made by All Brand to contact Mr. Geary, even to the point of having one of its

employees dispatched to the Geary warehouse facility, only to find that the warehouse was closed.

All Brand thereafter determined that Jim Taylor was the appropriate distributor in Brevard County and was most qualified to serve as its authorized distributor for that market. The evidence fully reflects a fair and reasonable business basis for that decision.

Regardless of whether or not § 25.01 Fla. Stat. (*see also All Brand Importers, Inc. v. Tampa Crown Distributors, Inc.*, 864 F.2d 748, 749 (11th Cir. 1989)) applies, Geary's claims are governed by the expressed provisions of the 1984 written agreement signed by All Brand. Although Geary had not signed it, the parties operated under that written document for some years. Section 16 of the agreement expressly provides that the business relationship between All Brand and Geary was personal to Geary. Neither the distributorship nor the obligations imposed by it could be assigned or delegated without the prior written consent of All Brand and Geary breached this aspect.

Geary's contention that All Brand's prior consent to distributorship assignments constitute a waiver of the supplier's rights under Section 16 of the written memorialization of their agreement is inaccurate. That same agreement provides that failure to require strict performance in one instance would not be deemed to waiver as to future instances. *See Kent v. Tallahassee Motor Co.*, 193 So. 821, 822 (Fla. 1940).

The Court finds that the agreement between Geary and Grantham was at all material times contingent upon Grantham receiving written approval as a distributor from All Brand. Finally, despite All Brand having

approved prior assignments, such were premised on All Brand's criteria and Grantham, who was not primarily a distributor of beer, simply did not meet All Brand's criteria. Geary's arrangement with All Brand did not constitute a license to force his choice of distribution on All Brand absent conduct by it which would constitute a waiver of its rights under the document under which the parties had operated – this simply did not happen.

There was no wrongful termination by All Brand as contended by Geary since the memorialization provided that the business relationship between the parties could be terminated by either party "forthwith" in the event that the other parties sold or transferred substantially all the physical assets, ownership or control of its business, and this Geary did.

The agreement specifically precluded Geary from assigning its rights to distribute All Brand's products without the prior written consent, and his doing so violated the contract between the parties.

An Order finding for the Defendant will issue.

/s7 Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date 12/11/91

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

GEARY DISTRIBUTING COMPANY, INC., Plaintiff,	)	Case No. 87-969-ORL-CIV-19
v.	)	
ALL BRAND IMPORTERS, INC., Defendant.	)	

ORDER

(Filed Dec. 11, 1991)

For the reasons stated in the Memorandum of the Court this day filed and deeming it proper so to do, it is ADJUDGED AND ORDERED that the Plaintiff recover nothing of the Defendant and that judgment be entered in favor of the Defendant All Brand Importers, Inc., who stands DISMISSED WITH ITS COSTS.

Let the Clerk send copies of the Memorandum and this Order to all counsel of record.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date 12/11/91